United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

ORIGINAL
and proof of service

74-2239

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, :

-against- : Docket No. 74 - 2239

MELVIN KEARNEY, :

Appellant. :

----------x

APPELLANT'S APPENDIX

JESSE BERMAN
Attorney for Appellant
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New York, N.Y. 10013
[212] 431-4600

PAGINATION AS IN ORIGINAL COPY

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INDICTMENT (73 Cr. 1039)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 CRIM. 1039

UNITED STATES OF AMERICA, :

- v - : INDICTMENT

MELVIN KEARNEY, : 73 Cr.
PHYLLIS POLLARD and
JOE LEE JONES, JR., :

Defendants. :

The Grand Jury charges:

From on or about the 1st day of June, 1973, up to and including the date of the filing of this Indictment, in the Southern District of New York and elsewhere, MELVIN KEARNEY, PHYLLIS POLLARD and JOE LEE JONES, JR., the defendants, and Twymon Myers (deceased) and Avon White, named herein as co-conspirators but not as defendants, unlawfully, wilfully and knowingly did combine, conspire and confederate and agree together, with each other and with divers other persons unknown to the Grand Jury, to commit offenses against the United States, to wit, to violate subdivisions (a), (b) and (d) of Section 2113 of Title 18, United States Code.

A. It was part of said conspiracy that the defendants unlawfully, wilfully and knowingly would take and attempt to take, by force and violence and by intimidation, from the person and presence of others, property and money belonging to, in the care, custody, control, management and possession of banks, the deposits of which were then and at all times referred to in this Indictment insured by the Federal Deposit Insurance Corporation (hereinafter "federally insured").

B. It was further a part of said conspiracy that the defendants unlawfully, wilfully and knowingly would take and carry away and would attempt to take and carry away with intent to steal and purloin, sums of money from banks, the deposits of which were federally insured.

C. It was further a part of said conspiracy that the defendants unlawfully, wilfully and knowingly would assault and put in jeopardy the lives of persons by the use of dangerous weapons and devices, to wit, firearms.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed:

1. On or about July 18, 1973, in the Southern District of New York, Twymon Myers (deceased), named herein as a co-conspirator but not as a defendant, drove an automobile containing the defendants MELVIN KEARNEY, PHYLLIS POLLARD and JOE LEE JONES, JR., and Avon White, named herein as a co-conspirator but not as a defendant, to the vicinity of the First National City Bank, 1855 Bruckner Boulevard, Bronx, New York.

2. On or about July 18, 1973, in the Southern District of New York, the defendants MELVIN KEARNEY, PHYLLIS POLLARD and JOE LEE JONES, JR., and Avon White, named herein as a co-conspirator but not as a defendant, entered the First National City Bank, 1855 Bruckner Boulevard, Bronx, New York.

3. On or about July 18, 1973, in the Southern District of New York, the defendant MELVIN KEARNEY discharged a firearm while on the premises of the First National City Bank, 1855 Bruckner Boulevard, Bronx, New York.

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4. On or about July 18, 1973, in the Southern District of New York, Twymon Myers (deceased), named herein as a co-conspirator but not as a defendant drove an automobile containing the defendants MELVIN KEARNEY, PHYLLIS POLLARD and JOE LEE JONES, JR., and Avon White, named herein as a co-conspirator but not as a defendant, from the vicinity of the First National City Bank, 1855 Bruckner Boulevard, Bronx, New York.

(Title 18, United States Code, Section 371.)

SECOND COUNT

The Grand Jury further charges:

On or about the 18th day of July, 1973, in the Southern District of New York, MELVIN KEARNEY, PHYLLIS POLLARD and JOE LEE JONES, JR., the defendants, and Twymon Myers (deceased) and Avon White, not named herein as defendants, unlawfully, wilfully and knowingly did, by force and violence and by intimidation, take from the person and presence of another property and money in the approximate amount of $5,000.00 belonging to and in the care, custody, control, management and possession of First National City Bank, 1855 Bruckner Boulevard, Bronx, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

(Title 18, United States Code, Sections 2113(a) and 2.)

THIRD COUNT

The Grand Jury further charges:

On or about the 18th day of July, 1973, in the Southern District of New York, MELVIN KEARNEY, PHYLLIS POLLARD and JOE LEE JONES, JR., the defendants, and Twymon Myers (deceased) and Avon White, not named herein as defendants, unlawfully, wilfully and knowingly, and with intent to steal

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and purloin, did take and carry away property and money in the approximate amount of $5,000.00 belonging to and in the care, custody, control, management and possession of First National City Bank, 1855 Bruckner Boulevard, Bronx, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

(Title 18, United States Code, Sections 2113(b) and 2.)

POURTH COUNT

The Grand Jury further charges:

On or about the 18th day of July, 1973, in the Southern District of New York, MELVIN KEARNEY, PHYLLIS POLLARD and JOE LEE JONES, JR., the defendants, and Twyson Myers (deceased) and Avon White, not named herein as defendants, in committing and attempting to commit the offenses alleged in the second and third counts of this Indictment, all allegations of which are incorporated herein by reference, unlawfully, wilfully and knowingly did assault and put in jeopardy the lives of persons by the use of dangerous weapons and devices, to wit, firearms.

(Title 18, United States Code, Sections 2113(d) and 2.)

FOREMAN

PAUL J. CURRAN
United States Attorney

DOCKET SHEET

. C. Form No. 100

RIMINAL DOCKET

JUDGE MOTLEY 73 CRIM. 1039

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
vs.	Daniel H. Murphy, II, AUSA
MELVIN KEARNEY	264-6350
PHYLLIS POLLARD	
JOE LEE JONES, JR.	
	For Defendant:

ABSTRACT OF COSTS	AMOUNT		CASH RECEIVED AND DISBURSED				
			DATE	NAME	RECEIVED	DISBURSED	
Fine,							
Clerk, 3 1 2							
Marshal,							
Attorney,							
T.18							
2113(a)(b)(d)							
obbery of insured bank							
y force and violence.(Cts2-4)							
onsp. so to do.(Ct.1)							
(Four Counts)							

DATE	PROCEEDINGS
15-73	Filed indictment.
16-73	Pollard-Filed affidavit for writ of H/C ad Pros.ret.11/19/73.
	Kearney-Filed affidavit for writ of H/C ad Pros. ret.11/19/73.
19-73	Joe Lee Jones,Jr.(atty. present) Pleads not guilty. Deft. continued in custody.
	Phyllis Pollard-Continued remanded in lieu of bail fixed at $50,000. Pleading adjourned to 11-26-73. Case assigned to Judge Motley for all purposes. Gagliardi,J.
11-21-73	M.KEARNEY - Deft produced on writ - Writ satisfied....Gagliardi, J.

OVER

JUDGE MOTLEY

73 Cr. 1039

DATE	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT
11-23-73	MELVIN KEARNEY - Deft produced on a writ, Court directs entry of not guilty plea, bail fixed at $100,000 cash or surety bond without prejudice to a renewal of a bail application before Judge Motley...Deft remanded in lieu of bail..Writ satisfied....Gagliardi,J.		
11-21-73	Filed affdvt. of D.H.Murphy,II AUSA in support of a writ.		
11-28-73	M.KEARNEY-Filed writ with marshal's return. Writ satisfied on 11-21-73.		
12-3-73	M.KEARNEY - Filed affdvt.of D.H.Murphy,II in support of a writ		
12-5-73	PHYLLIS POLLARD - Court directs entry of not guilty plea...Motley,J.		
12-7-73	M.KEARNEY-Filed writ with marshals return..executed 12-5-73		
12-10-73	M.KEARNEY - Filed affdvt.of D.H.Murphy,II AUSA for a writ.		
1-22-74	P.POLLARD - Application for reduction of bail(Atty.present) DENIED...Motley, J.		
2-8-74	P.POLLARD - Deft R.O.R. on condition that she live with her mother Hortense Cole and her brother A.Herman Crawford at 100-12 Entein Ave. Bronx, N.Y. until date of trial.....Motley, J.		
2-25-74	M.KEARNEY - Filed CJA appointment of Ralph Addonizio licensed investigator 185 Sullivan St. NYC		
3-12-74	Filed order that Margaret Ratner Esq. is added to the Panel of Atty's for the sole purpose of representing the deft Phyllis Pollard....Edelstein,Ch.J. (Copy to Clerk Court of Appeals 2nd Circuit)		
3-15-74	M.KEARNEY) P.POLLARD) - Filed affdvt. & notice of motion for a bill of particulars, for discovery and to suppress evidence		
4-5-74	PHYLLIS POLLARD - Filed affdvt. & notice of motion to suppress statements.		
4-5-74	M.KEARNEY-Filed order that U.S.Marshal take deft to Bellevue Hospital for examination. Ordered that Warden of Bronx House of Detention deliver deft to Marshal for that purpose.....Motley, J. (Mailed notice)		
4-29-74	M.KEARNEY-Filed CJA appointment of Ann Feller Court reporter 851 Grand Concourse Bx.NY		
4-29-74	M.KEARNEY-Filed CJA appointment of R.Wright Court reporter 851 Grand Concourse Bx.NY		

- Cont'd Page 3 -

DATE	PROCEEDINGS
3-29-74	M.KEARNEY - Filed CJA appointment of ~~xxxxxx~~ Pacific Street Film and Editing Corp. 58 Douglass St. Bklyn,N.Y.
5-7-74	M.KEARNEY - Filed memorandum of law on the Bruton and severance issues.
5-15-74	JOE LEE JONES - Deft & Atty.present...Withdraws plea of not guilty and PLEADS GUILTY to count 3...P.S.I. ordered...Deft to remain in custody until he receives plane ticket from his parents. Deft will then be R.O.R. until date of sentence.....Motley, J.
5-17-74	JOE LEE JONES - Hearing held..Deft to remain in custody until further order of the Court....Motley,J.
5-20-74	P.POLLARD - Filed petition to enter plea of guilty.....Motley, J. Atty.present,deft withdraws plea of not guilty and PLEADS GUILTY to count 3. P.S.I. ordered sentence adjd to 11 a.m.June 26-74 Deft R.O.R. & previous conditions.....Motley, J.
6-13-74	M.KEARNEY - Filed CJA 2 authorization for payment of Pacific St.Film Corp...Motley,J.
6-25-74	Filed excerpts plea of Joe Lee Jones...Ordered sealed and impounded...Motley, J.
6-24-74	MELVIN KEARNEY - Jury trial begun.
6-25-74	Trial cont'd.
6-26-74	Trial cont'd. & concluded...Verdict GUILTY on count 1 only NOT GUILTY counts 2.3 & 4. Sentence adjd to 11 a.m. Sept.17-74 Writ adjd to date of sentence.....Motley, J.
6-27-74	M.KEARNEY - Bench warrant ordered.....Motley,J.
6-27-74	M.KEARNEY - Bench warrant issued.
	(Filed Judgment)
7-2-74	JOE LEE JONES -Deft, Jones (Neal Hurwitz atty Present) . Sentenced as a Young Adult offender purst to Sec 5010 (a) of Title 19 U.S.C. as extended by Title 18 Sec 4209. Five (5) years on Count Three (3) E.S.S. Probation Five (5) years, Special Condition of probation being that the deft 1. Enroll in a school or training program that will lead to some specific job skill, 2. Deft, is to report in person , to the undersigned every three months onthe progress he is making towards acquiring education and / or training. 3. Deft and his probation officer is to report to the Court on Tuesday, Aug 13- 1974 at 11:AM on a proposed program of schooling and /for training. Cts. 1,2 & 4 dismissed. Motley, J.
7-2-74	Filed Writ of Habeas Corpus directed to the Warden (Avon White) Witness) , N.Y. State Correctional Inst. Ossining, N.Y. with Marshal return Writ Satisfied, 6-25-74. Motley, J.
7/8/74	Filed transcript of record of proceedings dated JUN 27 74 (FOR [illegible])
7-8-74	Filed transcript [illegible] dated JUN 27-74
9-12-74	Filed letter ordered sealed until further order of this Court....Motley,J. (Placed in vault 602)

D. C. 109 Criminal & Bankruptcy Continuation Sheet

—OVER—

DATE	PROCEEDINGS
Sept. 16-74	MELVIN KEARNEY - Filed notice of appeal from Judgment of 9-16-74...Copy to U.S.Atty. and to Deft at 427 West St. NYC (In forma pauperis) So Ordered Motley, J.....
Sept.16-	MELVIN KEARNEY - Filed Judgment(Atty.Jesse Berman,present)The deft is committed for imprisonment for a period of FIVE YEARS to run concurrently with sentence imposed the same date on Indictment 72 Cr.262.....Deft is Remanded....Motley,J. Ent. 9-19-74----------
Sept.12-74	PHYLLIS POLLARD - Filed Judgment(Atty.Margaret Ratner,present)the deft is sentenced as a YOUNG ADULT OFFENDER pursuant to Ti.18 U.S.C. Section 5010(a) as extended by Section 4209...Imposition of sentence is suspended and the deft is placed on probation for a period of FIVE YEARS, subject to the standing probation order of this Court and the following special conditions: a)that the deft make a good faith effort to obtain a high school equivalency diploma, and b) that the deft participate in a psychological or psychiatric counseling program as outlined in the report of Dr. Tiech....Cts. 1,2 and 4 are dismissed on motion of deft's counsel with the consent of the Govt.....Motley, J....Ent.9-19-74----------
9-26-74	MELVIN KEARNEY - Notice of motion for arrest of judgment, for dismissal of the indictment or for a new trial.
12-27-73	Filed Writ of Habeas Corpus for M. Kearney
-4-74	Filed CJA Appointment for Kearney
3-21-74	Filed Affidavit of Murphy AUSA
11-21-73	Filed Writ of Habeas Corpus of Pollard.
2-29-74	Filed Affidavit of Hemley AUSA
4-5-74	Filed Order of J. Motley
3-10-74	filed CJA Appointment of D. Panzer
4-19-74	Filed Order of CBM
4-25-74	Filed Writ of Habeas Corpus for Kearney
5-17-74	Filed CJA for Court Reporters
10-8-74	Filed notice that the original record on appeal has been certified and transmitted to the U.S.C.A. AS to M.Kearney
10-15-74	Filed transcript of record of proceedings, [illegible] 6-26-74
10-25-74	MELVIN KEARNY - Filed Memorandum to U.S.Magistrate from Asst.U.S.Atty.,Warrant of Arrest dated 8-17-72,Marshall's return unexecuted dated 7-19-74 - Dismissed,and Complaint.
11-12-74	Filed transcript of record of proceedings, dated 6-24-74
11-12-74	M.KEARNEY - Filed opinion #41427 Pursuant to F.R.C.P. 33 and 34, 18 U.S.C. 3500 deft moves for arrest of judgment, for dismissal or a new trial****Finally, as a miscellaneous matter, the remaining post trial motions proferred in 73Cr.1039 and 74 242 are denied without opinion as meritless....Motley,J. (Mailed notice)
11-12-74	M.KEARNEY - Filed affdvt.of R.B.Hemley,AUSA in response to deft's post-trial motions
11-12-74	M.KEARNEY - Filed Govt's memorandum of law

COURT'S CHARGE TO JURY
(Pages 481-519)

AFTERNOON SESSION

2:00 p.m.

(Trial resumed; jury present)

MR. BERMAN: Before the Court charges, there is a matter I would like to take up, again out of the hearing of the jury.

THE COURT: I recall what you had in mind, and we will take that up at the end, after the charge.

CHARGE OF THE COURT

THE COURT: Ladies and gentlemen, before formally beginning the charge, I want to thank you for your patience and for your cooperation in being prompt. I know that in order to serve on this jury each of you has had to make some personal or business sacrifice in order to do so. But you may also recall that I told you that when you serve on a jury you are playing a vital role in the administration of justice, and that trial by jury is a basic and cherished institution in our system.

I am sure that you know that we all have a stake in the fair and impartial administration of justice. So that any business or personal sacrifice that you had to make I am sure that you were glad to do in the interest of the fair and impartial administration of justice.

Also, before formally beginning the charge, I

would like to thank counsel on both sides for their patience with the Court and to congratulate each of them on the high degree of professional skill which each has demonstrated throughout this trial. I am sure you realize, ladies and gentlemen, that if justice is to be done in any case, both sides must not only be represented by counsel but they must be represented by competent counsel. And we have had that in this case.

I trust that you will bear with me now and give me that same degree of attention that you have given throughout the trial, so that you may carefully understand the legal principles which you are to apply to the facts in this case as you find them.

As you approach the performance of your function in this case, which is to determine the guilt or innocence of the defendant who is on trial, please remember that it is your duty to weigh the evidence calmly and dispassionately, without bias or prejudice or sympathy for or against either the Government or the defendant.

You also have to bear in mind that every defendant appearing before this Court is entitled to a fair and impartial trial regardless of his occupation or station in life.

Also, the fact that the Government is a party

here, that the prosecution is brought in the name of the United States of America, entitles it to no greater consideration than that which is accorded any other litigant in a lawsuit. By the same token, it is entitled to no less consideration. That is because all parties -- the Government and individuals alike -- stand equal before the law.

In the indictment in this case there are four separate counts or charges made, and you must return a separate verdict as to each count. Your verdict will be either guilty or not guilty. Your verdict as to each count must be based solely on the testimony which you have heard from the witness stand, on the exhibits which were actually received in evidence, and on any stipulations as to certain facts which the lawyers may have entered into, and on nothing else. Your verdict, of course, as to each count must be a unanimous verdict.

In the indictment, as you know, three persons are named as defendants: Melvin Kearney, Phyllis Pollard, and Joe Lee Jones. You are not to speculate as to why certain defendants are not on trial. There is only one defendant on trial, and it is only one defendant whose guilt or innocence you must consider today in returning your verdict. However, of course, in considering his guilt or innocence,

you will have to consider testimony relating to other persons named as defendants in the indictment.

As the sole and exclusive judges of the facts in this case, which means that you pass upon the weight of the evidence, you determine the credibility or believability of the witnesses who testified here, you resolve such conflicts as there may be in the testimony and other evidence, and you draw such reasonable inferences as may be warranted by the testimony or other evidence in the case.

Again, with respect to any matter of fact, it is your recollection which controls and not mine and not the lawyers.

With respect to the testimony, I want to remind you that you have to consider both the direct examination and the cross-examination of each witness. If in the course of these charges or instructions I should refer to some of the testimony in the case, that does not mean that I think that is the most important testimony or the only testimony you should consider or the only evidence. You have to consider all the testimony and all the evidence in arriving at your determination.

My function is to instruct you as to the law, and you should accept the law as I state it to you in these instructions. The logical result of that application of

the law as stated to you to the facts as you find them is a verdict in the case, and again you must find a separate verdict or return a separate verdict as to each count separately.

I want to caution you that you are not to single out any one instruction alone as stating the law, but you have to consider these instructions as a whole.

You are not to assume that I have any opinion as to the guilt or innocence of this defendant or the truth or falsity of any of the charges made in the indictment. The fact that I have granted motions or denied motions is not to be construed by you as any indication on my part that the Court believes the defendant to be guilty or not guilty or the charges true or not true. That is because, as I told you earlier, my ruling on any motion or objection has to do with questions of law and not questions of fact.

If, during the course of the trial, a question was asked and an objection was interposed and I sustained the objection, you are to disregard the question and any alleged facts contained in that question. Similarly, if I rule that an answer be stricken, you are to disregard both the question and the answer.

As you well know, the defendant has entered a plea of not guilty to each count made against him in this

indictment. As a result, the Government, if defendant is to be convicted on a particular count, has the burden of proving that the defendant is guilty as to that particular count beyond a reasonable doubt.

That is a burden which never shifts. As I told you when you first came in here, that is a burden which remains upon the Government throughout the entire trial. A defendant is not required to prove his innocence. He does not have to say anything. He does not have to cross-examine witnesses. He could just sit there.

A defendant in a criminal case is presumed to be innocent. This presumption of innocence, as I have just said, remains with him throughout the trial. It is in his favor even as I instruct you now. This presumption of innocence is in his favor even when you go into the jury room soon to deliberate. That presumption of innocence is removed only if and when, after your deliberations, you are convinced that the Government has sustained its burden of proof, and that is that it has produced evidence here which convinces you that the defendant is guilty as charged beyond a reasonable doubt.

The question which naturally comes up is: What is a reasonable doubt? The words almost define themselves. Reasonable doubt is a doubt founded in reason and arising

out of the evidence in the case or the lack of evidence. It is a doubt which a reasonable person has, after carefully weighing all the evidence, the kind of doubt which would make one hesitate to act. It means a doubt which is substantial and not merely shadowy. A reasonable doubt is one which appeals to your reason, your judgment, and your common sense and your experiences in life. It is not caprice, whim, or speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant.

If, after fair and impartial consideration of all the evidence, you can candidly and honestly say that you are not satisfied of the guilt of this defendant and that you do not have an abiding conviction as to this defendant's guilt, such a conviction as you would be willing to act upon unhesitatingly in important and weighty matters in the personal affairs of your own life, then you have a reasonable doubt and in that circumstance it is your duty to acquit the defendant.

On the other hand, if, after such a fair and impartial consideration of all the evidence, you can candidly and honestly say that you are satisifed of the guilt of this defendant, that you do have an abiding conviction as to this defendant's guilt, such a conviction as

you would be willing to act upon unhesitatingly in important and weighty matters in the personal affairs of your own life, then you have no reasonable doubt and in that circumstance you may convict the defendant.

A reasonable doubt does not mean a positive certainty beyond all possible doubt. It is practically impossible for a person to be absolutely and completely convinced about any controverted fact which by its nature is not subject to mathematical certainty. In consequence, the law in a criminal case is that it is sufficient if the guilt of a defendant is established beyond a reasonable doubt, not beyond all possible doubt.

As I told you, you as jurors are the sole judges of the credibility of the witnesses and the weight which their testimony deserves. You know, of course, that there is no automatic way to determine who is telling the truth and who is not. Credibility can be equated with believability and reliability. If a witness is credible, you say he is believable and reliable. If he is incredible, you say he is unbelievable. There is nothing mysterious about these words.

By what yardstick are you to judge the credibility of the witnesses? Each of you has given careful attention to the testimony as it came from the witnesses themselves.

You observed the witnesses. They sat right here in front of you where you could see them, the way they testified.

Issues of fact are presented for your determination. To a large extent the resolution of them depends upon the credibility of the witnesses and the support or lack of support they receive from other credible evidence in the case.

Your duty is to decide the issues of fact. Use your logic, your reason and your common sense. Don't be sidetracked or diverted or distracted by what you consider to be a minor or insignificant detail or irrelevancy, or by what you consider to be an appeal not to your reason or logic but to mere sentimentality or unthinking passion.

I repeat, use your common sense. You should carefully scrutinize all the testimony given, as I have said, both direct and cross-examination, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness' intelligence, motive, and state of mind, and demeanor and manner while on the witness stand. Consider each witness' ability to observe the matters as to which he has testified and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each witness might

bear to either side of the case, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause a jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently. An innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or unimportant detail and whether the discrepancy results from innocent error or intentional falsehood.

You should not be influenced by the number of witnesses that either side has called or the number of documents received in evidence, because it is the quality of the testimony and other evidence which counts, not the quantity.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you think it deserves.

If you find that any witness has wilfully testified falsely as to any material matter, you may reject

the entire testimony of that witness or you may accept such part or portion as commends itself to your belief or which you find corroborated by other evidence in the case.

The testimony of a witness may be discredited or impeached by showing that the witness has been convicted of a felony. Prior conviction does not render a witness incompetent to testify but is a circumstance which you may consider in determining the credibility of such witnesses.

As I told you when the trial commenced, an indictment is not proof or evidence. It is merely an accusation or a charge made by a grand jury. It is a method or technique or procedure which we employ in our system whereby persons who are accused by a grand jury of crimes are brought into court and then their guilt or innocence is determined by a petit jury or trial jury such as you are.

Again, the indictment names three defendants, only one of which, as I told you before -- Mr. Kearney -- is on trial before you. He is the only defendant whose guilt or innocence you are to decide. The guilt or innocence of Mr. Kearney is to be decided by you on the basis of the testimony and other evidence in the case and on nothing else.

The fact that another defendant named in this case -- that is, Joe Lee Jones, Jr. -- has entered a plea

of guilty, as he testified, to Count 3 is not to be taken by you as evidence that Mr. Kearney is also guilty as charged in the indictment. Again I repeat the guilt or innocence of the defendant now on trial before you is personal and is to be determined solely upon the testimony which you have heard from the witnesses who took the witness stand here and the exhibits which were actually received in evidence and on nothing else.

During the course of the trial you heard the testimony not only of Mr. Jones but of Mr. White, Avon White, individuals who testified concerning their own involvement in the crimes charged in the indictment. Under the law they are called accomplices, and under the law in order for one to be an accomplice, as I have indicated, he must be concerned in or participate in the commission of the crime with which a defendant is charged, he must be a participant in that crime.

An accomplice does not become incompetent as a witness because of his participation in the crime charged. His testimony is not to be rejected unless the jury thinks it has no weight. Like any other testimony, it is to be considered and dealt with by the twelve men and women who are the triers of the fact, and such evidence is properly considered.

However, it must be considered with care and scrutiny, checked up with the other facts in the case, and given due weight.

The testimony of an accomplice alone, if believed by you, may be of such weight to sustain a verdict of guilt on any count, even though it is not corroborated or supported by otner evidence in the case.

Again, you should keep in mind that the testimony of an accomplice is always to be received with caution and weighed with great care. You should never convict a defendant upon the unsupported testimony of an accomplice unless you believe that unsupported testimony beyond a reasonable doubt.

You are instructed that, in weighing the testimony of a Government witness charged as a co-conspirator in the indictment, you may take into account any motives the witness may have in testifying for the Government.

For example, the witness here, Mr. Jones, has pleaded guilty to Count 3 and has not yet been sentenced. He testified that he hopes that as a result of his cooperation with the Government he will be dealt with leniently.

Mr. Avon White testified to the same effect, that he hoped to be dealt with leniently.

This factor does not disqualify the testimony of these witnesses but may well affect the weight you give their testimony in adjudging the guilt or innocence of these defendants. Again, I want to point out, as I did, I think, during the course of the trial, that when any witnesses testified it is proper to bring out evidence from which the jury may find that the particular witness has a motive to testify falsely or to exaggerate his or her testimony.

Again, the fact that Mr. Jones has pleaded guilty and that Mr. White has made an admission of guilt is not enough to find defendant Kearney guilty. You must determine whether they offered believable testimony, credible testimony, that Mr. Kearney committed the crimes charged -- testimony that convinces you of his, Mr. Kearney's, guilt beyond a reasonable doubt.

You are not obliged to accept testimony, even though the testimony is not impeached. You may decide because of the witness' bearing and demeanor or because of the inherent improbability of his testimony, or for other reasons sufficient to you, that such testimony is not worthy of belief.

The Constitution and the laws provide that in any criminal matter, as I have told you repeatedly now, the

defendant is under no obligation to testify or indeed come forward with any evidence, because the burden of proving a violation of the law is solely and exclusively on the prosecution. I therefore charge you that you are not to consider in any way the fact that the defendant, Mr. Kearney, has chosen not to testify in this case. That is his right under the law, and you are not permitted to speculate on the reasons why he did not testify. Nor may you draw any inference of any kind from his decision not to take the stand. His decision is a choice shared by every defendant in every criminal case in this country, and may in no way be used against him as a substitute for or as a supplement to the evidence before you.

Now coming to the indictment itself, I am going to read each charge in the indictment separately, and then I am going to tell you what the Government must have proved beyond a reasonable doubt before you could find the defendant guilty on a particular charge. In other words, I am going to tell you about each element of a particular charge which the Government must prove beyond a reasonable doubt.

If you find that the Government has failed to prove any one of the elements of the crime charged as I enumerate and discuss them for you, then you must acquit the defendant on that particular charge.

As I have said, each charge will be read separately. The elements of each charge which the Government must establish will be set forth, enumerated, and I will discuss those which need discussion in greater detail. So you listen very carefully now to each charge in the indictment.

Charge 1 we call the conspiracy charge. Counts 2, 3, and 4 we call substantive charges. So I will start with the conspiracy charge, Count 1.

"The grand jury charges:

"From on or about the 1st day of June, 1973, up to and including the date of the filing of this indictment in the Southern District of New York and elsewhere, Melvin Kearney, Phyllis Pollard and Joe Lee Jones, Jr., the defendants, and Twymon Myers (deceased) and Avon White, named herein as co-conspirators but not as defendants, unlawfully, wilfully and knowingly did combine, conspire and confederate and agree together, with each other and with divers other persons unknown to the grand jury, to commit offenses against the United States, to wit, to violate subdivisions (a), (b) and (d) of section 2113 of Title 18, United States Code.

"A. It was part of said conspiracy that the defendants unlawfully, wilfully and knowingly would take and

attempt to take, by force and violence and by intimidation, from the person and presence of others, property and money belonging to, in the care, custody, control, management and possession of banks, the deposits of which were then and at all times referred to in this indictment insured by the Federal Deposit Insurance Company (hereinafter 'federally insured').

"B. It was further a part of said conspiracy that the defendants unlawfully, wilfully and knowingly would take and carry away and would attempt to take and carry away with intent to steal and purloin, sums of money from banks, the deposits of which were federally insured.

"C. It was further a part of said conspiracy that the defendants unlawfully, wilfully and knowingly would assault and put in jeopardy the lives of persons by the use of dangerous weapons and devices, to wit, firearms.

"In furtherance of said conspiracy and to effect the objects thereof,the following overt acts, among others, were committed:

"1. On or about July 18, 1973, in the Southern District of New York, Twymon Myers (deceased), named herein as a co-conspirator but not as a defendant, drove an automobile containing the defendants Melvin Kearney, Phyllis Pollard, Joe Lee Jones, Jr., and Avon White, named herein

as a co-conspirator but not as a defendant, to the vicinity of the First National City Bank, 1855 Bruckner Boulevard, Bronx, New York.

"2. On or about July 18, 1973, in the Southern District of New York, the defendants Melvin Kearney, Phyllis Pollard, and Joe Lee Jones, and Avon White, named herein as a co-conspirator but not as a defendant, entered the First National City Bank, 1855 Bruckner Boulevard, Bronx, New York.

"3. On or about July 18, 1973, in the Southern District of New York, the defendant Melvin Kearney discharged a firearm while on the premises of the First National City Bank, 1855 Bruckner Boulevard, Bronx, New York.

"4. On or about July 18, 1973, in the Southern District of New York, Twymon Myers (deceased), named herein as a co-conspirator but not as a defendant, drove an automobile containing the defendants Melvin Kearney, Phyllis Pollard, Joe Lee Jones, Jr., and Avon White, named herein as a co-conspirator but not as a defendant, from the vicinity of the First National City Bank, 1855 Bruckner Boulevard, Bronx, New York."

The indictment cites Title 18, United States Code, section 371.

Title 18, United States Code, section 371, provides

in pertinent part as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons does any act to effect the object of the conspiracy, each shall be guilty of a crime."

What is a conspiracy? A conspiracy is a collective criminal agreement, a partnership in crime. A conspiracy presents a greater potential threat to government and society than acts committed by a lone wrongdoer. For this reason the Congress has made conspiracy to violate a federal statute a separate crime. Concerted action for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which an individual acting alone could accomplish.

In order to prove the crime of conspiracy which I have just read to you from this indictment, the Government must establish to your satisfaction beyond a reasonable doubt each of the following essential elements of that crime:

First, the existence of the conspiracy, as alleged in the indictment;

Second, that it was a purpose of the conspiracy

as alleged in the indictment to violate Title 18, United States Code, section 2113(a), (b) and (d);

Third, that the defendant, Melvin Kearney, knowingly and wilfully became a participant or a member of the conspiracy;

Fourth, that at least one of the co-conspirators committed at least one of the overt acts set forth in the indictment which I have just read to you, in furtherance of the conspiracy and during the course of the conspiracy.

Now, I want to discuss each one of those four elements in greater detail.

First, the existence of the conspiracy as alleged in the indictment. To establish a conspiracy the Government is not required to show that two or more persons sat around a table and entered into a solemn compact orally or in writing stating that they have formed a conspiracy to violate the law, setting forth details of the plan, the means by which the unlawful project is to be carried out, or the part to be played by each co-conspirator. Indeed, it would be extraordinary if there were such a formal agreement or specific oral agreement.

Your common sense will tell you that when men in fact undertake to enter into a criminal conspiracy, much is left to unexpressed understanding. Conspirators do not

usually reduce their agreements to writing or acknowledge them before a notary public, nor do they publicly broadcast their plans. From its very nature a conspiracy is almost invariably secret in origin and in execution.

Therefore, it is sufficient if you find that two or more persons in any manner, through any contrivance, impliedly or tacitly -- that means silently -- come to a common understanding to violate the law.

Ex ess language, as I have said, or specific words are not required to indicate assent or attachment to a conspiracy, nor is it required to find that all the co-conspirators alleged in the indictment joined in the conspiracy in order to find that a conspiracy existed. You need only find that one alleged co-conspirator, or the defendant and one other, entered into an unlawful agreement in order to find that a conspiracy existed.

In determining whether there has been an unlawful agreement, you may judge acts and conduct of the alleged co-conspirators which are done to carry out an apparent criminal purpose. The old adage "Actions speak louder than words" is applicable here. Usually the only evidence available of a conspiracy is that of disconnected acts, which, however, when taken together in connection with each other show a conspiracy to secure a particular result as

satisfactorily and conclusively as more direct proof.

Proof concerning the accomplishment of the object of a conspiracy, if you find that it was accomplished, may be the most persuasive evidence of the existence of the conspiracy itself. In other words, success of the venture, if you believe it was successful, may be the best proof that a conspiracy existed.

In determining whether the conspiracy charged actually existed, you may consider the evidence of the acts and the conduct of the alleged conspirators as a whole, and the reasonable inferences to be drawn from such evidence.

If upon such consideration of the evidence you find beyond a reasonable doubt that the minds of at least two of the alleged co-conspirators met in an understanding way and that they agreed, as I have explained a conspiratorial agreement to you, to work together in furtherance of the unlawful scheme, then proof of the existence of the conspiracy, but only of its existence, is complete.

While the indictment charges that the conspiracy began on or about June 1, 1973, and continued up to on or about November 15, 1973, it is not essential that the Government prove that the conspiracy started and ended on or about those specific dates. It is sufficient if you find

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that a conspiracy was formed and existed for some substantial time within the period set forth in the indictment, and that at least one of the overt acts as alleged in the indictment was committed in furtherance of the conspiracy during that period.

An overt act which you find did occur need not have occurred on a specific date set forth in the indictment. You need only find that it occurred no earlier than June 1, 1973, and no later than November 15, 1973.

Now, as to the second element -- that is, that you must find that it was a purpose of the conspiracy to violate Title 18, United States Code, section 2113(a), (b) and (d) -- the indictment charges that this was an object of the conspiracy, that is, to violate these particular provisions of the bank robbery statute. In order for you to find that there was a conspiracy here, you must find that this was an object of the conspiracy or the purpose of it.

Now we come to the third element of the conspiracy, and that is that this defendant knowingly and wilfully became a participant of or a member of the conspiracy. If you conclude that a conspiracy as charged did exist and that its purpose was to violate the bank robbery statute sections which I referred to--and during the course of this charge I will read those various sections--you must next

determine whether the defendant on trial here was a member of the conspiracy, that is, whether he participated in the conspiracy with knowledge of its unlawful purposes and in furtherance of its unlawful objectives.

A defendant's participation in a conspiracy, like its existence, can be inferred from such facts and circumstances in evidence as logically sustain that inference. I want to caution you, however, that mere association of one defendant with an alleged conspirator or conspirators does not establish his participation in the conspiracy if you find that one did exist. So,too, mere knowledge by a defendant of the conspiracy or of any illegal act on the part of an alleged co-conspirator is not sufficient evidence to establish his membership in the conspiracy. That is because you must find, as I have said, actual, knowing and wilful participation by this defendant in the agreement to violate the law.

An act is done knowingly if it is done voluntarily and purposefully and not because of mistake, accident, mere negligence, or some other innocent reason. An act is done wilfully if it is done knowingly, deliberately, and with an evil motive or purpose. In determining whether a defendant has acted wilfully, it is not necessary for the Government to establish that defendant knew that he was breaking any

particular law or any particular rule. It must, however, prove that defendant had an evil motive or bad purpose in mind.

Simply stated, and by using the partnership analogy, by becoming a partner, one who joins a conspiracy assumes all the liabilities of the partnership.

Once you are satisfied beyond a reasonable doubt that a conspiracy as alleged existed and that defendant was a member of it, any acts and declarations of any person who you find was also a member of the conspiracy made during its pendency and in furtherance of its objectives are considered, as I said a moment ago, the acts and declarations of all other members, even though the particular defendant was not present at the time or did not know that such statements were made or such acts were done by others in furtherance of the conspiracy. Because, as I have said, you may apply the partnership analogy, that is, that one who becomes a partner assumes all of the liabilities of the partnership or assumes responsibility for all the acts done by the partnership -- in this case all the acts done in furtherance of the conspiracy or anything said in furtherance of the conspiracy.

Now we come to the fourth and final element which you must find -- the fourth element being that at least one

of the co-conspirators committed at least one of the overt acts. The fourth element is because the offense of conspiracy is complete only when the unlawful agreement is made and any single overt act to effect the object of the conspiracy is thereof committed by at least one of the co-conspirators.

An overt act is any step, action or conduct which is taken to achieve, accomplish, or further the objects of the conspiracy. The purpose of requiring proof of an overt act is that while parties might conspire and agree to do an unlawful thing, they may change their minds or even abandon the project and do nothing to carry it into effect, in which event it would not be an offense. Therefore, proof of an overt act in furtherance of the conspiracy is required.

The prosecution is not required to set forth in the indictment each and every act on which it relies to establish the conspiracy or the defendant's participation therein, nor is it required to prove each overt act which may have occurred during and in furtherance of the conspiracy. But, as I have said, it is required to prove that at least one overt act as charged in the indictment did take place here in the Southern District of New York, which includes the Bronx.

The overt act need not be criminal in and of itself, but it must be an act which tends toward the accomplishment of the plan or scheme charged in the conspiracy count and must be knowingly done in furtherance of some object of the conspiracy.

You will recall that during my discussion of this conspiracy count I told you that a conspirator, one who is found to be a member of the conspiracy, is liable for the acts and statements of his co-conspirators, provided that they were said or done within the scope of the unlawful agreement as the defendant saw it during the pendency of the conspiracy and in furtherance of its objectives.

Accordingly, with respect to Counts 2, 3, and 4, which charge bank robbery, bank larceny, and armed bank robbery, I instruct you that if you find beyond a reasonable doubt, first, that Avon White, Phyllis Pollard, Joe Lee Jones, and Twymon Myers were members of a conspiracy and committed the acts charged in Counts 2, 3, and 4 of this indictment, and, second, that defendant Melvin Kearney was a member of the conspiracy, and, third, that the crimes charged in Counts 2, 3, and 4 were committed in furtherance of the conspiracy or its objective, then you may find that the defendant Melvin Kearney is guilty of Counts 2, 3, and 4.

In other words, if you find that the Government has established each and every essential element of those substantive crimes which I am about to get to, and that they were part of a conspiracy as alleged in the indictment, you may find Mr. Kearney guilty of each one of those crimes if you find that, as I have said, he was a member of the conspiracy and that those crimes were committed in furtherance of the conspiracy.

Now we come to those substantive counts, as we call them. I have finished discussion of the conspiracy count. Count 2 of the indictment charges Mr. Kearney with bank robbery. Although there was only one bank robbery involved here, the indictment may charge the four separate crimes set forth in this indictment with respect to that one bank robbery, because each of these are separate crimes. And I told you that conspiracy is a separate crime in and of itself. Now that I have finished that, I will move to Count 2, which reads as follows:

"That on or about the 18th day of July, 1973, in the Southern District of New York, Melvin Kearney, Phyllis Pollard, and Joe Lee Jones, Jr., the defendants, and Twymon Myers (deceased) and Avon White, not named herein as defendants, unlawfully, wilfully, and knowingly did, by force and violence and by intimidation, take from the person

and presence of another property and money in the approximate amount of $5,000 belonging to and in the care, custody, control, management and possession of First National City Bank, 1855 Bruckner Boulevard, Bronx, New York, a bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation."

With respect to this charge, the indictment cites Title 18 United States Code, section 2113(a). That statute reads in pertinent part as follows:

"Whoever, by force and violence, or by intimidation, takes or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, is guilty of a crime."

In order to find the defendant guilty of this charge, you must find the following seven elements have been established beyond a reasonable doubt:

First, that there was a conspiracy as charged in Count 1;

Second, that defendant was a member of the conspiracy;

Third, that on or about July 18, 1973, the First National City Bank, 1855 Bruckner Boulevard, Bronx, New York, was a bank the deposits of which were insured by the

Federal Deposit Insurance Corporation;

Fourth, that on or about July 18, 1973, one or more members of the conspiracy, in furtherance of the conspiracy, took money from the bank which belonged to or was in the care, custody, control, management or possession of that bank;

Fifth, that the money was taken from the person or presence of one or more persons other than the defendants;

Sixth, that a member of the conspiracy accomplished this taking by force and violence or by intimidation;

Seventh, that a member of the conspiracy knowingly and wilfully did the act or acts charged.

There are a couple of these elements that I think need further explanation. As to the sixth element, which is that the taking of the money must have been accomplished by force and violence or by intimidation, a few words of explanation may be useful. With respect to this sixth element, the Government is not required to show that force and violence were actually used against anyone if it proves beyond a reasonable doubt that the taking was the result of intimidation -- that is, the result of placing another person or persons in fear. Intimidation may be established by proof of circumstances that are normally and reasonably calculated to arouse fear in the ordinary run of human

beings.

So if it happened that some extraordinarily timid person was put in fear by some sort of words or action which would not normally frighten anyone, this would not be the kind of an intimidation with which the statute is concerned.

On the other hand, if the proof shows conduct by a defendant which would normally be expected to generate fear, then it is not necessary that those affected should actually have experienced some terror or panic or hysteria. The question, in short, in this respect is an objective one: It is whether the Government has sustained its burden of showing conduct of the accused which was of such nature as to be a sensible and reasonable basis for the creation of fear.

As to the seventh element, I believe I have already referred to and defined for you what is meant by knowingly and wilfully. I will not repeat those definitions again. But, with respect to each one of these charges, before the defendant can be found guilty you must find that he acted unlawfully, wilfully and knowingly.

Now we come to the third count of the indictment, and that charges bank larceny as distinguished from bank robbery. That counts reads as follows:

"On or about the 18th day of July, 1973, in the

Southern District of New York, Melvin Kearney, Phyllis Pollard and Joe Lee Jones, Jr., the defendants, and Twymon Myers (deceased) and Avon White, not named herein as defendants, unlawfully, wilfully and knowingly, and with intent to steal and purloin,did take and carry away property and money in the approximate amount of $5,000 belonging to and in the care, custody, control, management and possession of First National City Bank, 1855 Bruckner Boulevard, Bronx, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Company."

With respect to this count the indictment cites Title 18, United States Code, section 2113(b). That statute provides in pertinent part as follows:

"Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to or in the care, custody, control, management or possession of any bank..." is guilty of a crime.

In order to find the defendant guilty on Count 3, you must find the Government has established each of the following elements beyond a reasonable doubt:

First, the existence of a conspiracy as charged in Count 1;

Second, that defendant Kearney was a member of the

conspiracy;

Third, that on or about July 18, 1973, the First National City Bank at 1855 Bruckner Boulevard, Bronx, New York, was a bank the deposits of which were insured by the Federal Deposit Insurance Corporation;

Fourth, that a member of the conspiracy, in furtherance of the conspiracy, took and carried away approximately $5,000 which belonged to or was in the care, custody, control, management or possession of that bank;

Fifth, that such taking and carrying away was with an intent to steal and purloin; and

Sixth, that the members of the conspiracy acted unlawfully, wilfully and knowingly.

As for the fifth element, that the taking and carrying away was with an intent to steal and purloin, I want to say a word. The word "steal" has a broad meaning. It simply means an unlawful taking of property with the intent to deprive the owner of his property. "Purloin" is merely another word for steal.

Now we come to the fourth and final count of the indictment, which is the armed bank robbery count, and that count reads as follows:

"On or about the 18th day of July, 1973, in the Southern District of New York, Melvin Kearney, Phyllis Pollard

and Joe Lee Jones, Jr., the defendants, and Twymon Myers (deceased) and Avon White, not named herein as defendants, in committing and attempting to commit the offenses alleged in the second and third counts of this indictment, all allegations of which are incorporated herein by reference, unlawfully, wilfully and knowingly did assault and put in jeopardy the lives of persons by the use of dangerous weapons and devices, to wit, firearms."

In this connection the indictment cites Title 18, section 2113(d). That section reads as follows. Well, I will give you the pertinent parts of that particular section. That section makes it a crime if in the course of the commission of a bank robbery or a bank larceny the persons accused assaults any persons or puts in jeopardy the life of any person by the use of a dangerous weapon or device.

In order to find the defendant guilty of Count 4, you must find that the defendant is guilty of Counts 2 or 3 or both. Because, as I have said, this has to do with the assault or putting in jeopardy during the course of a bank robbery or a bank larceny. In addition, you must find beyond a reasonable doubt that the defendant in the course of committing that crime, bank robbery or bank larceny or both, either assaulted one or more persons or by the use of

a dangerous weapon or weapons, that is, firearms, put in jeopardy the lives of one or more persons.

As I have indicated, this count requires a finding either that there was an assault or that the life of a person or the lives of more than one person were put in jeopardy by the use of a dangerous weapon.

It is not essential to find both an assault and an endangering of lives by the use of a dangerous weapon.

In considering this particular count, you have to keep in mind and attempt to remember the legal definition of the word "assault." That word is defined to refer to an unlawful attempt or threat to apply force and violence, to inflict bodily harm, when the attempt or threat is coupled with an apparent present ability to carry it out, such as to arouse fear in the intended threatened victim that he would be subject to immediate physical injury.

An assault, as it is defined in law, may be committed without actually touching or striking or doing bodily harm to the person in question. For example, the flourishing or pointing of a gun or pistol at another person for the purpose of putting that other person in fear is sufficient to constitute an assault.

As I have said, even if you find no assault, this charge may nevertheless be established if you find that the

life of one or more persons was put in jeopardy by the use of a dangerous weapon in this case. To justify such a finding in this case, you must be convinced beyond a reasonable doubt that one of the alleged robbers carried one or more firearms, which was drawn and loaded.

As I said a moment ago, with respect to each one of these counts you must find that the defendant acted unlawfully, wilfully and knowingly. Obviously, unlawful means contrary to law. Again, if an act is done knowingly, it is done voluntarily and purposefully and not because of mistake, accident, mere negligence or other innocent reason. An act is done wilfully if it is done knowingly, deliberately, intentionally, and with an evil motive or purpose.

In determining whether a person has acted wilfully, it is not necessary for the Government to establish that that person knew that he was breaking any particular law or any particular rule. But the Government must show bad purpose or motive on the part of the defendant.

Again, with respect to each count, if you find that the Government has failed to establish any one of the essential elements of the crimes charged, as I have just enumerated them for you and discussed them for you in detail, beyond a reasonable doubt, you must acquit the

defendant of that particular count which you were then considering.

If, on the other hand, you find that the Government has established each and every one of the essential elements beyond a reasonable doubt as to that particular charge, then you may find the defendant guilty of that charge.

The jury is not to consider or in any way to speculate about the punishment which a defendant may receive if he is found guilty. The function of a jury is to determine the guilt or innocence of a defendant on the basis of the evidence and the Court's instructions as to the law. It is then for the Court alone to determine what the punishment will be or what the sentence will be, if there is a conviction.

The most important part of this case, ladies and gentlemen, is the part which you now as jurors are about to play, because it is for you and you alone to determine whether this defendant is guilty or not guilty with respect to each charge made against him in this indictment.

I know you will try the issues that have been presented to you according to the oath which you have taken as jurors. In that oath you promised that you would well and truly try the issues joined and a true verdict render.

I suggest to you that if you follow that oath and

try the issues without combining your thinking with any emotions, you will arrive at a just verdict.

It must be clear to you that once you get into an emotional state and let fear or prejudice or bias or sympathy interfere with your thinking, then you will not arrive at a true and just verdict.

As you deliberate, ladies and gentlemen, please be careful to listen to the opinions of your fellow jurors and to ask for an opportunity to express your own views. That is because no one juror holds the center stage in the jury room and no one juror may control or monopolize the deliberations. If, after listening to your fellow jurors and after stating your own view, you become convinced that your view is wrong, do not hesitate because of stubbornness or pride of opinion to change your view. On the other hand, do not surrender your honest conviction solely because of the opinion of your fellow jurors or because you are outnumbered.

Again, with respect to each count, your verdict must be unanimous and your verdict must be either guilty or not guilty.

When you go to the jury room to deliberate, you may send for any exhibits you want to see or have any testimony read back.

You are instructed that you are not to reveal the standing of the jurors, that is, the split of the vote at any time to any one for any reason, including the Court.

Will counsel please approach the bench.

(In the robing room)

THE COURT: Mr. Berman, do you have any exceptions to the charge?

MR. BERMAN: Do you want those first or my remarks on Mr. Hemley's summation?

THE COURT: No. I will take the exceptions. We will take Mr. Hemley's summation after the jury has gone out. Do you want to make a motion for a mistrial?

MR. BERMAN: Yes, I do.

THE COURT: We will take that after the jury goes out.

MR. BERMAN: Very well. I have just four specific matters and two general matters.

In the charge that you gave on impeachment because of conviction for a prior felony, you had indicated before summations that you were going to give my Request No. 6, but you only gave the first third of it and you left out the part charging them that Avon and Joe Lee have been convicted of felonies, and that is a legal matter which has to be told to the jury: that what those men have been

VOIR DIRE OF PROSPECTIVE JUROR RAMIREZ

How many of you have ever been charged with a crime? Juror No. 5.

A (PJ 5) Yes.

Q Juror No. 5. What crime were you charged with?

A Drugs.

Q When was that?

A 1970.

Q 1970?

A Yes.

Q And did you go to trial in that case?

A No. I pleaded guilty.

Q I see. What drug was involved?

A Possession of marijuana.

Q Possession of marijuana. You say that was 1970?

A Yes.

Q Was that a felony?

A Well, I do have another case in California, which is a felony. This was a misdemeanor.

Q You have a felony conviction in California?

A Yes.

Q I think you are disqualified by that reason.

MR. BERMAN: Your Honor, may we have a side bar first?

THE COURT: Yes.

(At the side bar)

MR. BERMAN: Before the Court rules on disqualifying him, perhaps if we can ask him another question or two about what the nature of the crime is. It may well be that he thinks it is a felony but it is not a felony. And his opinion doesn't make much of a difference as to whether it

was a felony or not. At least we ought to have him describe in somewhat more detail what it was.

MR. HEMLEY: In the absence of any court record, I think we are bound by his representation as to what it was. Even short of a felony, a man with two convictions on his record can hardly be impartial in judging another man guilty or innocent. He must necessarily have drawn some conclusions about law enforcement and criminal procedures.

THE COURT: Yes. You see, the prospective juror himself made the distinction before I could even ask him. He knew the difference between a felony and a misdemeanor on his own. So it seems to me clear that hewas convicted of a felony in California, and he is disqualified by statute. So there cannot be any waiving of that. If he has been convicted of a felony, he is disqualified as a matter of law.

MR. HEMLEY: And I think, your Honor, rather than wait until we find out for sure --

THE COURT: He may say something prejudicial.

MR. HEMLEY: Why risk a mistrial? Dispose of it quickly.

MR. BERMAN: I want two quick things to say for the record. One is that we should just ask him what crime it was, because he may be mistaken.

THE COURT: He said he has a felony in California.

MR. BERMAN: In any event, my position is that the statute that would automatically exclude anyone with a felony conviction is unconstitutional, in that it deprives Mr. Kearney of a right to trial by a jury of his peers, and there is nothing in and of the mere fact of a felony conviction that makes one not capable to serve on a jury. A felony conviction may well be some ridiculous marijuana conviction in California back in the late sixties, which was then a felony, for possession of over an eighth of an ounce or something like that. And unless we know what the facts are, at least the basic fact as to what the crime was, to merely say that because he thinks he was convicted of a felony he is disqualified for cause deprives Mr. Kearney of his right to trial by the first twelve jurors who come into that box, unless disqualified for cause or challenged peremptorily.

THE COURT: I can ask him if he has been pardoned. I think the statute provides that if he has been pardoned or he has had his civil rights restored he can then serve. I will just ask him that additional question.

MR. HEMLEY: I have no objection.

(In open court)

BY THE COURT:

Q Juror No. 5. I believe you said you were convicted of a felony in California?

A Yes.

Q What did that involve?

A Sales of drugs.

Q What kind of drug was involved?

A Heroin.

MR. HEMLEY: What was the answer?

A Heroin.

Q Heroin. Have you been pardoned for that crime?

A No; I was sentenced.

Q I see.

A To a YA, they called it up there, Youthful Offender. I was a minor.

Q How old were you at the time?

A 18, going on 19.

Q And your conviction was not wiped out as a Youthful Offender?

A Well, I never checked into it. It's been some like fifteen, fourteen years.

Q How much time did you spend in prison?

A Sixteen months.

Q Was that a state court in California?

A Yes.

MR. BERMAN: Your Honor, I would like to be heard again.

THE COURT: All right.

(At the side bar)

MR. BERMAN: On reasoning based on experience and analogy here, in drug cases in state courts there are gradations by weight, gradations which aren't prominent in the federal drug laws, and he may well mean that he was convicted of a felony weight, but if it was as a YA in California, assuming that is analogous to a YO in New York State courts, Youthful Offender adjudication, in New York in the state courts that is not a conviction of a crime. It is an adjudication as a Youthful Offender, based on an underlying act which if committed by an adult would be a crime.

I for one do not believe that the statute that will exclude felony convicted jurors from sitting on a jury would also exclude one who is convicted as a youth, which again is adjudicated a Youthful Offender and which may not be an adjudication of a crime. In New York State it is not considered a criminal conviction.

THE COURT: What year did he say this was?

MR. BERMAN: Fourteen years ago.

THE COURT: You know, fourteen years ago, under

the federal law, a Youthful Offender could not be treated, as I recall, as a Youthful Offender, for a charge of this character. Am I recalling that correctly?

MR. HEMLEY: Your Honor, I would just say this: It seems to me we are on very thin ground here and engaging in speculation as to what the California law was fourteen years ago. The man served sixteen months in prison. By federal standards that would necessarily involve a felony charge. For us to risk a mistrial and later find out that the Youthful Offender treatment was a felony seems to me to be very uncautious.

MR. BERMAN: I can solve that problem.

MR. HEMLEY: In addition, a man who has had, as I previously stated at the side bar, the kind of encounters that this gentleman has had with the law cannot have an open slate with respect to the administration of criminal justice. He has had two drug encounters with the law. I think he should be disqualified for cause.

MR. BERMAN: Your Honor, I would waive any objection if it should turn out that under the California law fourteen years ago that was a felony. We are making no claim later of a mistrial or an error. I will waive any objection to that. I am arguing that the fact that he did sixteen months was in an institution for Youthful Offenders

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a reformatory sentence, is not necessarily more than one year necessarily being a felony sentence. That is not regarded as a punitive sentence. It is regarded as a special youth sentence and can't be analogized automatically to a felony sentence.

MR. HEMLEY: He also said that he was convicted of a felony.

THE COURT: Yes. I think it is quite possible that in California, even a youth charged with selling heroin was guilty of a felony. I think that was true in the federal system. He could not be treated as a Youthful Offender. And it was not until the amendment to the drug laws in 1970 or thereabouts, I think, that the Youthful Offenders were entitled to that treatment at time of sentence for the sale of heroin. So it is quite possible that he is telling us correctly that it was a felony.

I think what you are overlooking, Mr. Berman, is the Government is entitled to a fair trial too. You are saying that the defendant is entitled to a fair trial. But the Government is too. And to have somebody on there who has been twice convicted would be unfair to the Government, especially when one was a felony.

MR. BERMAN: He said it was a Youthful adjudication.

THE COURT: He will be excused.

(In open court)

THE COURT: Juror No. 5 is excused.

THE CLERK: Mr. Ramirez excused by the Court. Please return to Room 109.

MEMORANDUM OPINION DENYING MOTION FOR A NEW TRIAL
(November 11, 1974)

Memorandum Opinion and Order

Pursuant to Federal Rules of Criminal Procedure 33 and 34, 18 U. S. C. § 3500, the Due Process clause of the Fifth Amendment and the authority of Brady v. Maryland, 373 U. S. 83 (1963), defendant in 73 Cr. 1039 moves for arrest of judgment, for dismissal of the indictment, or, in the alternative, for a new trial on the grounds that the Government failed to disclose exculpatory and inconsistent statements by its chief witness, Avon White. In particular it is claimed that the report of the September 17, 1973 FBI interview of Avon White (at oral argument referred to as the "Margaret Statement") should have been turned over to the defense before the cross-examination of White.[1] The Government agrees that the report was "3500 material" and should have been turned over pursuant to this court's pretrial order of March 25, 1974 granting the defendant's various discovery motions of March 13, 1974. The Government contends, however, that the failure to turn over the "Margaret statement" was inadvertent, and accordingly opposes the relief sought by defendant on these post-trial motions. For the reasons which follow, the court agrees with the Government and denies defendant's motion.

Citing a number of circumstances, defendant maintains that the Government's failure to turn over the "Margaret statement" was deliberate, and hence urges the court to adopt the somewhat relaxed test applicable to such deliberate action. The test is that a new trial is warranted if the undisclosed evidence thus deliberately withheld is merely favorable to the defendant. Giglio v. United States, 405 U. S. 150, 153-154 (1972). Alternatively, the defendant would be satisfied were the court to characterize the failure as inexcusable and grant the requested relief. Under this theory, if it is shown that the evidence was of such a high value that it could not have escaped the prosecutor's attention, relief would be warranted without requiring a showing that the suppression was intentional. United States v. Kahn, 472 F.2d 272, 287 (2d Cir.), cert. denied, 411 U. S. 932 (1973).

Defendant's claim that the "Margaret statement" was intentionally omitted from the "3500 material" properly turned over is defeated by the fact that the Government did turn over numerous materials including reports of other statements made by Avon White to the FBI which were far more exculpatory and more useful for purposes of impeachment than the "Margaret statement" at issue in this motion. In particular, the

Government turned over Exhibit "3513", an FBI report of an interview with Avon White on September 26, 1973. In "3513" White left out the defendant's name in his list of the participants of the bank robbery with which the defendant was charged in the instant indictment. The exculpatory value of "3513" could hardly be surpassed by any other document. It goes to all crimes charged in the indictment, both inchoate and complete. Defense counsel skillfully exploited this omission at trial. (Tr. 376-77, and 437-38.)

Further, the "Margaret statement" was not of such a high value that it could not have escaped the prosecutor's attention. In that statement co-defendant Phyllis Pollard was not named as a participant. Instead, Avon White had told FBI agents that someone named "Margaret" had been the female participant. However, the same statement does name defendant Kearney as a participant. In the view of the prosecutor, it was merely another recitation of the crimes which the FBI had been investigating. The same information was available in other reports. Dictum in a recent case decided in the Second Circuit suggests that the failure to turn over FBI reports such as the one at issue is compatible with the conclusion, which the court makes here, that such failure was inadvertent. United States v. Sperling, et al.,

___ F.2d ___ (3d Cir., decided October 10, 1974) (Docket No. 73-236) (Slip Op. at 5649).

Viewing the failure to turn over the "Margaret statement" as inadvertent, and applying the appropriate test as outlined in United States v. Kahn, supra, the court concludes that retrial is not warranted. The court agrees with defense counsel that the "Margaret statement" is relevant to the conspiracy count of which defendant was convicted. However, its persuasive value — even developed by skilled counsel — is not such that it would have induced a reasonable doubt so as to avoid conviction. As the court sees it, the "Margaret statement" is merely cumulative, and accordingly denies relief based on the Government's failure to disclose the statement.

Defendant also seeks relief on the ground that the Government failed to reveal the full extent of the deal reached with Avon White, in violation of the court's order of March 25, 1974. Insofar as the nature of the deal was brought out on cross-examination, and fully exploited for the benefit of the defendant at trial, the court denies the relief sought.

Finally, as a miscellaneous matter, the remaining post-trial motions preferred in 73 Cr. 1039, and 74 Cr. 242

are denied without opinion as meritless.

Dated: New York, New York

November 11, 1974

SO ORDERED

CONSTANCE BAKER MOTLEY
U. S. D. J.

FOOTNOTE

1. That portion of the "Margaret statement" on which defendant relies reads as follows:

> "On July 18, 1973, AVON WHITE, MELVIN KEARNEY, TYRONE MYERS, the girl named MARGARET and a male by the name of JOE, participated in the armed robbery of the First National City Bank, 1855 Bruckner Boulevard, Bronx, New York. WHITE advised that MYERS, [and] the girl known as MARGARET stole the car used in this robbery from Queens College."

Defendant's position is that this statement is exculpatory as to the defendant Kearney since he is charged in the indictment, inter alia, as having conspired with Phyliss Pollard, as opposed to having conspired with a person named Margaret. It is also claimed that the statement would have been useful in the impeachment of the Government's witness, Avon White, since it is inconsistent with other accounts of the robbery in which he names Phyliss Pollard, rather than Margaret.